BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT EMMONS and
LANDWATCH LANE COUNTY,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

DAVID GRANT,
Intervenor-Respondent.

LUBA No. 2004-111

FINAL OPINION
AND ORDER

Appeal from Lane County.

Christine M. Cook, Portland, filed the petition for review and argued on behalf of the petitioners.

No appearance by Lane County.

Laurence E. Thorp, Springfield, filed the response brief and argued on behalf of the intervenor-respondent. With him on the brief was Thorp, Purdy, Jewett, Urness and Wilkinson, P.C.

DAVIES, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REVERSED 02/02/2005

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Davies.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a comprehensive plan amendment redesignating property from "Agricultural Land" to "Nonresource" and rezoning the property from "E-30/Exclusive Farm Use" to "RR-5/Rural Residential."

MOTION TO INTERVENE

David Grant, the applicant, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

DOCUMENTS SUBMITTED AT ORAL ARGUMENT

At oral argument, intervenor's attorney submitted two documents. One was an enlargement of a copy of a zoning map that is in the record, with highlighting added to show the zoning of nearby properties. The other is a table summarizing the county's findings supporting its conclusions and the corresponding pages of the appendix to the petition for review where those findings can be located. Petitioners' attorney objected orally to the submission of those documents and was allowed time to file a written motion with any objections, but did not do so.

Our rules permit limited use of demonstrative exhibits.[1] The reason we limit the use of demonstrative exhibits is to prevent a party from achieving an advantage through use of elaborate presentation documents that are neither included in the party's brief nor the record. Both of the documents submitted by intervenor go beyond what OAR 661-010-0040(5) allows. While the disputed highlighted map is from the record, the highlighting was not added to the map during oral argument. Therefore, the highlighted map technically does not comply with the requirements of OAR 661-010-0040(5). However, the deviation from OAR 661-010-0040(5) is trivial, and we

[1] OAR 661-010-0040(5) limits the use of demonstrative exhibits at oral argument at LUBA as follows:

> "Demonstrative exhibits presented at oral argument shall be limited to copies of materials already in the record, including reductions or enlargements, or materials created during the party's presentation at oral argument."

see no prejudice to petitioners in that trivial deviation from the rule's requirements. We will consider the highlighted map.

The tabular listing of findings that the intervenor relies on is more problematic. It lists findings that the intervenor is relying on in response to each of petitioners' assignments and subassignments of error. Either that listing identifies the same findings that intervenor identifies in his brief, in which case the listing is unnecessary, or the listing expands on the findings that are identified in his brief, in which case the listing is improper. In either event, it constitutes *de facto* responsive argument that should have been included as part of intervenor's brief so that it could have been available to petitioners before oral argument. We do not consider the tabular listing of findings.

FACTS

The subject property, identified as tax lot 700, is a 30.19-acre parcel currently zoned exclusive farm use (EFU). Natural Resources Conservation Service (NRCS) maps for the property indicate that 80% of the property is composed of Sifton gravelly loam soil. The NRCS soil survey for Lane County rates the Sifton soil as a Class III soil. [2] The NRCS also provides a forest productivity rating for the Sifton soil of 182 cubic feet per acre per year. Cloquato silty loam, a Class II soil, comprises 8% of the site, and 12% of the site is made up of Oxley gravelly silt loam, a Class III soil.

Across the McKenzie Highway, which abuts the property to the north, is the community of Walterville, zoned and developed for residential use. One property adjoining the subject property to the south and east, tax lot 600, is owned by intervenor's parents. They have owned tax lots 600 and 700 since 1976, when they were a combined 107-acre tract. Intervenor leases land to the west, tax lot 1100, which is also zoned EFU. Intervenor has farmed the subject property, along

[2] Intervenor's expert states that the NRCS classification for the Sifton soil is Class IV, and the county agreed. There is evidence in the record that the current NRCS classification of the Sifton soil unit is Class III, whether irrigated or not. Whether the proper NRCS rating for the Sifton soil is Class III or Class IV, it would be considered "agricultural land" under the Goal 3 definition, so the discrepancy is irrelevant regarding the identification as "agricultural land."

with the two adjoining properties, since 1977. In 1977, intervenor began planting mint on portions of his parents' property. At most, intervenor planted 60 acres in mint. In 1998, he replaced 25 acres of mint with sugar beets, and continues to grow sugar beets on approximately 70 acres on tax lot 600. Approximately six acres of the subject property have water rights, which are not currently being used.

In 1978, intervenor began planting filbert trees, which he describes as "trash trees" that were given to him for free. Some of the trees did well and others did not, depending on the rockiness of the soil and the availability of water. In 2000, intervenor grossed approximately $14,600 for three deliveries of filberts from those trees. The subject property contains a barn and other structures that either serve or have served as storage and other uses for the farming activities on the subject property and adjacent properties farmed by intervenor.

In 2001, intervenor filed an application seeking to redesignate the property as nonresource.[3] The county approved the application, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners assign error to the county's conclusion that the subject property is nonresource land. They cite to the definition of "agricultural land" in Statewide Planning Goal 3 (Agricultural Lands) and the administrative rules implementing Goal 3. Goal 3 defines "agricultural land" as follows:

> "Agricultural land in western Oregon is land of predominantly Class I, II, III and IV soils * * * as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land-use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be

[3] As we explained in *DLCD v. Klamath County*, 16 Or LUBA 817, 820 (1988), there are two ways a county can justify a decision to allow nonresource use of land previously designated and zoned for farm or forest uses. One is to take an exception to its farm or forest goals. The other is to adopt findings which demonstrate the land does not qualify either as forest land or agricultural land under Goals 3 and 4.

> undertaken on adjacent or nearby lands, shall be included as agricultural land in any event."[4]

OAR 660-033-0020(1)(b) adds to the definition of "agricultural land" in Goal 3 the following lands:

> "Land in capability classes other than I-IV * * * that is adjacent to or intermingled with lands in capability classes I-IV * * * within a farm unit, shall be inventoried as agricultural lands even though this land may not be cropped or grazed[.]"

Petitioners identify in these provisions four separate and distinct types of "agricultural land," any one of which qualifies the land as "agricultural land" under Goal 3.[5] If the property is any one of these four types of agricultural land, petitioners argue, it cannot be considered nonresource land and an exception to Goal 3 is required to plan and zone it for nonresource use. Although the soils capability test in OAR 660-033-0020(1)(a)(A) is generally the initial inquiry, we address the "farm unit" test first because, as discussed below, we reverse on that issue and resolution of petitioners' arguments regarding the soils capability test is therefore unnecessary.

Where land is not within the capability classes I–IV pursuant to OAR 660-033-0020(1)(a)(A), but is "adjacent to or intermingled with lands in capability classes I-IV * * * within a farm unit," it is "agricultural land" even though it may not be cropped or grazed. OAR 660-033-0020(1)(b), *see* n 4. Intervenor attempts to frame the issue regarding the "farm unit" test as primarily a substantial evidence challenge. Intervenor's Brief 7. Intervenor and the county are

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[4] OAR 660-033-0020(1)(a) provides a nearly identical definition of "agricultural land:"

> "(A) Lands classified by the U.S. Natural Resources Conservation Service (NRCS) as predominantly Class I-IV soils in Western Oregon and I-VI soils in Eastern Oregon;
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> "(B) Land in other soil classes that is suitable for farm use as defined in ORS 215.203(2)(a), taking into consideration soil fertility; suitability for grazing; climatic conditions; existing and future availability of water for farm irrigation purposes; existing land use patterns; technological and energy inputs required; and accepted farming practices; and
>
> "(C) Land that is necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands."

[5] These agricultural lands are lands that are (1) within the stated capability classes, (2) suitable for farm use, (3) part of a farm unit, or (4) necessary to permit farm practices on adjacent or nearby lands.

correct that the determination under this provision depends largely on the facts, and petitioners do challenge some of the county's findings. However, the issue on appeal is purely a legal question; *i.e.*, whether the subject property is part of a "farm unit." The county relies on three cases applying the farm unit test. Record 57-60.[6] We discuss each case in turn.

In *DLCD v. Coos County*, 24 Or LUBA 137, *rev'd on other grounds*, 117 Or App 400, 844 P2d 907 (1992), we applied the farm unit test to a 20-acre portion of a 175-acre parcel. The 175 acres was created when the existing ranch was divided into two separate working ranches. 24 Or LUBA at 140. Although the 20 acres consisted of Class VII soil and was identified in a farm management plan as "swamp and relatively useless," we held that "it is clear that the 175-acre parcel was created as a cattle ranching farm unit." *Id*. at 143-44. Because the 20 acres was "adjacent to or intermingled with" Class I-IV soils on the remainder of the farm unit, we held the county erred in concluding that the subject property was not "agricultural land." *Id*. at 144.

DLCD v. Curry County, 132 Or App 393, 888 P2d 592 (1995), involved a proposed plan amendment and zone change for 233 acres of a 272-acre parcel. As in *DLCD v. Coos County*, the 272 acres had been partitioned from a larger tract. When they were partitioned, both resulting parcels were to be managed as two separate farm units, with two separate farm management plans. The Court of Appeals identified the purpose of the farm unit test:

> "The fact that all of the land comprises a single operating farm unit makes the quality of particular parts of it a marginal factor in determining whether the unit is

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[6] The county's findings on this issue are lengthy and we do not repeat them all here. However, after summarizing and applying the factors it gleans from the cases, the county adopts the following findings regarding application of the "farm unit" test:

> "Factual evidence has been provided that the Subject Property has never been managed or operated for agricultural use in conjunction with other adjacent lands, which have completely different crops, different soil, and different growing conditions such as available irrigation. The site has never been part of an overall farm management plan for the applicant's holdings in the area. The Board finds that the Subject Property is not part of a 'farm unit.' If the Board found that the presence of the Applicant's residence and barn on the Subject Property make it a part of a farm unit, it would have to reach the same conclusion if they were located across the McKenzie Highway in a subdivision or five miles away in the City of Springfield. That would be an absurd result." Record 59-60.

> 'agricultural,' and a central consideration in identifying the rule's objective to be the preservation of the unit as a whole." 132 Or App at 398.

The Court affirmed LUBA's opinion overturning the county's determination that the subject parcel was not a farm unit pursuant to OAR 660-033-0020(1)(b) because the 233 acres was clearly part of a farm unit.

Finally, and perhaps most relevant, the Court of Appeals affirmed our determination on the farm unit test in *Riggs v. Douglas County*, 167 Or App 1, 1 P3d 1042 (2000). That case involved a 337-acre sheep ranch that was in operation from 1950 through 1974. In 1974, the entire tract was divided into three smaller parcels which were separately conveyed. However, the entire tract was maintained as a single unified sheep ranch until 1996, when the owner of one of the parcels discontinued ranching operations and sold his parcel as residential land. 167 Or App at 3. The petitioners argued that the ownership history of the parcels in question was irrelevant and that the only inquiry was the current use and ownership of the property. *Id*. at 6-7. The Court of Appeals appears to have based its conclusion that the parcel at issue was agricultural land under the farm unit test, at least in part, on the apparent coincidental timing of the owner's sale or conversion to residential use with the parcel's severance with the remaining farm unit. *Id*. at 8 ("it would be squarely contrary to [the purpose of the rule] to interpret the [farm unit] rule as contemplating that a parcel could cease being part of the unit simultaneously with and simply because of the discontinuation of farm operations on it or its ostensible sale for nonfarm purposes").

In this case, the county's finding that the subject property "has never been managed or operated for agricultural use in conjunction with other adjacent lands" is not supported by substantial evidence. Intervenor made a profit from the filberts grown on the subject property up until a year before he filed the subject application. Record 147. The adjacent parcels, farmed by intervenor, include soils in Classes II-IV, and, according to intervenor's soils expert, approximately

33% of the subject property is Class I-IV soils.[7] Record 111. The filbert orchard on the subject property extends onto tax lot 600, the property adjacent to the east and onto tax lot 1100, the property to the west. Record 1287-88. Tax lot 600 and the subject property are in common ownership and have been farmed together since the late 1970's. Finally, the subject property contains the barn and farmhouse, which clearly demonstrates that the subject property was part of a larger farm unit.[8]

The county's findings and intervenor make much of the fact there was no farm management plan, as there was in *Coos County* and *Curry County*. Intervenor's Brief 10, 14; Record 58. However, a farm management plan is not a necessity. It is merely further evidence that a farm unit exists. Here, intervenor has farmed the subject property and surrounding properties since the 1970s. The crops and farming activities apparently have not recognized the boundary lines of the separate properties, but, rather, intervenor has treated the entire property as a cohesive unit.

The subject property is adjacent to and intermingled with class I-IV soils, and is a part of a farm unit as a matter of law. The county erred in concluding otherwise.

The county's decision is reversed.[9]

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[7] Petitioners dispute intervenor's soil study and argue that the subject property is composed entirely of Class I-IV soils. We do not reach or resolve that argument but assume for purposes of this opinion that intervenor's soil study is accurate and reliable. That study estimates the nonresource land at 67% of the subject property. By process of deduction, 33% would be resource land or soils in Classes I-IV.

[8] The conclusion that the subject property is part of a farm unit is bolstered if the county's finding that the subject property was never farmed were supported by substantial evidence. If the subject property was never farmed, then the presence of the barn and farmhouse on the subject property means that the subject property had to have been part of a larger farm unit.

[9] Because we reverse on this provision of the rule, we need not address petitioners' other arguments under their first assignment of error or their second assignment of error.